IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 326 327

GEORGE SCHWARTZ,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

CHARLES D. LEWIS,
Attorney for Petitioner.

JAMES DEMPSEY,
of Counsel.

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, George Schwartz, respectfully prays that a *writ of certiorari* issue to review the decision of the United States Circuit Court of Appeals for the Second Circuit affirming a judgment of the United States District Court for the Southern District of New York which convicted your Petitioner of the larceny of goods moving in foreign commerce and of conspiracy to commit such larceny.

A.

Statement of Matters Involved.

I. Petitioner and four other persons, Anthony Colonna, James Alyosius Stegman, Florindo Isabella and Joseph Kaps were indicted jointly by an indictment filed in the United States District Court for the Southern District of New York on February 10, 1943 and containing two counts.

Count one charged the defendants with violating Section 409, Title 18, U. S. C. A. by stealing from a Mack truck, "beginning on or about July 1, 1942 and continuously thereafter up to and including September 30, 1942 at the Southern District of New York", 495 cases of Scotch whiskey "moving as a part of a foreign shipment of freight consigned by James Martin & Co., Ltd., Leith, Scotland, to McKesson & Robbins, Inc. at No. 111 Eighth Avenue, New York, N. Y." Count two charged a conspiracy by the defendants to meet in Hoboken, New Jersey on August 3, 1942 for the purpose of boarding a Hoboken-West Twenty-third Street ferry, holding up the Mack truck carrying the whiskey described in count one, kidnapping its drivers, stealing the whiskey and concealing it in a garage owned by the defendant Jack Kaps in Brooklyn, N. Y.

The case came on for trial before a Judge of the District Court and a jury and was tried on November 3 and 6, 1944. Petitioner alone stood trial, a severance having been obtained as to the defendant Colonna on motion of the prosecution and pleas of guilty having been taken by the other defendants. One of these defendants, James Stegman, became a witness for the prosecution and testified that Petitioner participated in the crimes charged; the other two, Florindo Isabella and Jack Kaps did not testify. It was stipulated, however, that Kaps was will-

ing to testify, but, if called, would be unable to identify the Petitioner as a participant in the crimes. On the advice of his trial counsel, Petitioner offered no evidence on his own behalf but rested on the prosecution's case.

Sentence was pronounced on all the defendants except Colonna on November 21, 1944. Petitioner was sentenced to ten years' imprisonment on the first count of the indictment and two years on the second, to run consecutively, and is now serving this sentence. The other defendants also are serving prison terms except the defendant Stegman, who received a suspended sentence.

Petitioner's conviction was affirmed by the United States Circuit Court of Appeals for the Second Circuit on July 17, 1945 by the decision now sought to be reviewed. Said decision and the opinion of the Circuit Court of Appeals are hereto annexed as Appendix A to the accompanying brief.

II. The case was tried by the prosecution and submitted by the trial court to the jury on the specific issue of Petitioner's participation in the crimes of larceny of merchandise "moving as part of a foreign shipment of freight" and of conspiracy to commit such a larceny. In its charge the trial court left to the jury to determine "if this was a theft while being transported in foreign commerce" and framed the issue as follows:

> "You are to determine here if he conspired to do the acts charged by the Government. Was this merchandise being shipped from Scotland and did he steal, take and carry away with intent to steal and convert this liquor moving as part of a foreign shipment and did he conspire so to do."

The only proof in the case was the evidence offered by the prosecution. This proof was wholly undisputed and established the following facts:

James Martin & Co., Ltd., Leith, Scotland shipped 1,000 cases of Scotch whiskey under a bill of lading providing for delivery at the Port of New York running to the Manufacturers Trust Company of New York as consignee, or its assigns, and bearing the notation "Notify McKesson & Robbins, Inc., 111 Eighth Avenue, New York, N. Y." The cases were invoiced to McKesson & Robbins. Prior to the arrival of this whiskey on the steamer at Hoboken, New Jersey, McKesson & Robbins, Inc. had paid the Manufacturers Trust Company for the whiskey and the latter had assigned the bill of lading to it. McKesson & Robbins, Inc. had also paid the freight charges in full but not the customs duties and taxes on the shipment.

McKesson & Robbins, Inc. was engaged in the business of importers and wholesalers and also operated a Class 1 Bonded Warehouse of the United States Government wherein was stored in bond McKesson & Robbins' own liquors as well as the liquors of other importers. Both business enterprises were conducted at the same address, 111 Eighth Avenue, New York City.

On the morning of August 3, 1942, McKesson & Robbins, Inc. sent a Mack truck operated by two of its employees to Pier 1 in Hoboken, New Jersey, to pick up 495 cases of the whiskey and deliver them to its bonded warehouse. Previous to this date it had picked up 500 cases. This truck had been leased to McKesson & Robbins, Inc. by the Budget Transportation Company and was under the complete direction and control of McKesson & Robbins, Inc. It was a bonded truck and licensed as such in the United States Customs. Five cases of the whiskey were kept out to go into the public stores for examination by Government customs appraisers and the remaining 495 cases were delivered to McKesson & Robbins, Inc.'s representatives who turned over the bill of lading and documents showing the payment of the price and freight charges to the shipper's agents and received and accepted the whiskey and loaded it onto the truck.

The truck then proceeded to the Hoboken-West Twenty-third Street Ferry enroute to New York City and when the ferry boat had arrived at the slip in New York the drivers of the truck were held up by two armed men at the point of revolvers and were forced, after leaving the ferry to stop the truck on Eleventh Avenue, New York City, and get into an automobile in which a third robber had followed the truck from Hoboken. This third robber then drove the whiskey truck to the garage of another defendant in Brooklyn where the whiskey was unloaded.

This hold-up and "hijacking" occurred in broad daylight on a Monday afternoon in August 1942 on a crowded public ferry in a busy ferry-slip in New York City yet no person could be found to identify Petitioner as one of the participants in the hold-up except the defendant James Stegman and his brother William Stegman, both self-confessed accomplices with records of prior "hijackings", who testified for the prosecution.

Of ten other witnesses whose testimony was offered or stipulated by the Government none could identify Petitioner as a participant in any of the acts charged in the indictment.

The petitioner's guilt or innocence as an alleged participant in the theft of the 495 cases of whiskey depended entirely on the weight which the jury should attach to the credibility of these accomplices. The jury itself so stated. The trial court refused the request of Petitioner's counsel to charge that the jury "must scrutinize with special care the testimony of one who is an accomplice" and stated in its main charge:

> "You have the testimony of witnesses who have criminal records. You have the right to consider that upon the question of their credibility, their criminal records. Certain witnesses are accomplices, you will scrutinize their testimony with care and caution, and give it such weight as you think it is entitled to. In

this court a defendant may be convicted on the uncorroborated testimony of an accomplice. The Government claims it was corroborated here.

One of the witnesses, James Aloysius Stegman, has pleaded guilty and is awaiting sentence, when he testified as a witness. Of course every witness expects that by testifying he is going to get a consideration. He would be entitled to consideration if he were telling the truth. In a case like this in all probability he is going to be sentenced by this Court, by myself. Is he more likely to tell the truth or an untruth when he is testifying before the Judge who is going to sentence him? Those are matters for you to consider. What is he to gain by telling the truth? What is he to gain by committing perjury in this case? Do you think it is going to help him if he commits perjury and he is going to be sentenced by this Court? Just use your common sense and reason. These are matters for your consideration."

B.

The Questions Presented.

There are three questions only presented:

(1) Did the denial of the Petitioner's motion for a directed verdict of acquittal on the ground that the whiskey, when stolen, was no longer moving in foreign commerce constitute an unlawful abdication by the trial judge of an essential common law prerogative preserved in the Federal Courts under the United States Constitution and violate the *due process of law* guarantees of the Fifth and Sixth Amendments to the United States Constitution?

(2) Can the judgment of conviction be sustained on the ground that the whiskey, when stolen, was moving in interstate commerce, without sanctioning a fatal variance between the indictment and the proof and without depriv-

ing Petitioner of the right to be informed of the nature of the accusation against him as guaranteed by the Sixth Amendment and violating the *due process of law* guarantees of the Fifth and Sixth Amendments to the United States Constitution.

(3) Did the trial court's instructions and remarks to the jury and its denial of requests to charge materially prejudice Petitioner's right to a fair and impartial trial and violate the *due process of law* guarantees of the Fifth and Sixth Amendments to the United States Constitution?

C.

The questions presented involve basic rights under the Constitution of the United States and the Articles of Amendment thereto. These rights have been affirmed frequently by this Court as fundamental, and the applicability of the provisions of the Fifth Amendment with respect to a defendant's right to an impartial trial under the guarantee of the Sixth Amendment has often been stressed. But the precise matters involved in the first two questions presented appear never to have been passed upon by this Court.

These questions are of great public interest, in that they entail consideration of the right to possession and custody of bonded merchandise held for the protection of the lien of unpaid United States Customs duties and involve the application of laws regulating commerce to movements of merchandise in bond in the United States Customs and in that they are of importance in the administration of the criminal laws in both the Federal courts and the courts of the different States of our Union and in the safeguarding of the liberties guaranteed by the United States Constitution to those accused of crime.

Your Petitioner verily believes that this application presents a case cognizable by this Honorable Court

under the Constitution and statutes of the United States and the rules of this Honorable Court, and one eminently proper for review by this Honorable Court.

Wherefore, your Petitioner respectfully prays that a *writ of certiorari* be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review a full and complete transcript of the record of all proceedings in said suit, proceeding or matter, and to stand to and abide by such order and direction as your Honorable Court shall deem meet and the circumstances of the case require, and that your Petitioner may have such other and further relief or remedy in the premises as to this Honorable Court may seem just and proper.

Dated, White Plains, New York, August 13, 1945.

CHARLES D. LEWIS,
Attorney for Petitioner.

JAMES DEMPSEY,
of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

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UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

POINT I

At the time it was stolen, the whiskey was no longer moving in foreign commerce and the trial court erred in not directing a verdict of acquittal and in denying petitioner's motion to set aside the verdict.

The Government's own proof, wholly uncontradicted, established that the contract of shipment of the whiskey was terminated and the foreign transportation completed at Pier 1, Hoboken, New Jersey.

Regardless of what may have been the original place of delivery (and we submit that the bill of lading specifies no other place than the steamship company's pier in

Hoboken), once McKesson & Robbins, Inc. paid the Manufacturer's Trust Company for the 1,000 cases and acquired full ownership thereof by having the bill of lading assigned to it, McKesson & Robbins, Inc. had the absolute right to change the contract of shipment and with it the transportation in any way agreeable to it and the steamship carrier.

> "The control over goods in process of transportation, which may be repeatedly changed by sales, is one thing; the transportation is another thing, and follows the contract of shipment, until that is changed by the agreement of owner and carrier".
>
> *Gulf, Col. & Santa Fe R'way. Co.* v. *Texas,* 204 U. S. 403, 412.

The agreement made by McKesson & Robbins, Inc. and the steamship carrier, evidenced by the practice and course of conduct betwen them on this shipment of 1,000 cases of Scotch whiskey and on prior shipments, was that the whiskey should be discharged onto the dock at Pier 1, Hoboken and there delivered to McKesson & Robbins, Inc. after payment of the price and all freight charges. Under this agreement, McKesson & Robbins, Inc. was to enter the whiskey in Customs pending payment of the duties, accept the delivery thereof at Pier 1, Hoboken, load it on to its own bonded trucks there and remove it in said trucks to the bonded warehouse of McKesson & Robbins, Inc. at 111 Eighth Avenue, New York City.

With the freight charges paid, the whiskey entered in the Customs as the property of McKesson & Robbins, Inc. and actually delivered to McKesson & Robbins' authorized representatives, and the bill of lading turned over by McKesson & Robbins, Inc., the steamship carrier had no further interest in or right to interfere with the shipment. Neither had the shipper or any one else. This was so even though the customs duties remained unpaid.

> *In Re Talbot & Poggi,* 185 Fed. 986;
> *Cartwright* v. *Wilmerding,* 24 N. Y. 521.

The reciprocal rights of the shipper, the carrier and the owner came to an end once the contract of shipment was fulfilled, either according to its original terms or according to any change in these terms mutually agreed to by the owner and shipper.

Gulf, Col. & Santa Fe R'way. Co. v. *Texas,* 204 U. S. 403, 412;
Texas & N. O. R'way. Co. v. *Sabine Tram. Co.,* 227 U. S. 111, 126;
Western Union Telegraph Co. v. *Foster,* 247 U. S. 105, 113.

It is true, of course, as this Court has stated in *U. S.* v. *The Erie Railroad Co., et al.,* 280 U. S. 98, that the nature of the shipment is not dependent upon the question when or to whom the title passes, but rather by the essential character of the commerce.

But the essential character of the commerce is determined by the practice and typical course of dealing of the parties evidencing their final agreement.

Chicago M. & St. Paul R'way. Co. v. *Iowa,* 233 U. S. 334;
Western Union Telegraph Co. v. *Foster,* 247 U. S. 105;
Atlantic Coast Line R'way. Co. v. *Standard,* 275 U. S. 257.

Regardless of whether the intention of the shipper and the original consignee of these 1,000 cases of whiskey was to make No. 111 Eighth Avenue, New York City, the destination of the shipment, this intention and the contract of shipment were later changed when McKesson & Robbins, Inc., the assignee of the original assignee, purchased the whiskey in transit, paid the full price and all freight charges thereon, entered the whiskey in Customs

in its own name as owner, surrendered the bill of lading to the shipper, took physical possession of the whiskey and placed it in McKesson & Robbins, Inc's. own bonded truck for storage in its own bonded warehouse.

Under this modification, if it can be called a modification, the nature of the transportation was likewise changed so as to follow the contract of shipment.

Gulf, Col. & Santa Fe R'way. Co. v. *Texas,* 204 U. S. 403;
Bracht & San Antonio & A. P. R. Co., 254 U. S. 489.

We respectfully submit that when the whiskey was entered in the Customs at Hoboken in the name of the consignee, McKesson & Robbins, Inc. and there physically delivered to and accepted by the consignee the foreign movement in commerce came to rest. The foreign shipment of freight was completed then and there.

Heyman v. *Southern R'way. Co.,* 203 U. S. 270;
Gulf, Col. & Santa Fe R'way. Co. v. *Texas,* 204 U. S. 403;
Kirmeyer v. *Kansas,* 236 U. S. 568;
Danziger et al. v. *Cooley,* 248 U. S. 319;
O'Kelley v. *U. S.,* 116 F. (2d) 966 (C. C. A. 8).

As was stated by this Court in *Danziger et al.* v. *Cooley, supra,* at page 327:

> "He (defendant in error), was at the point of destination and held the bill of lading, which carried with it control over the delivery. Conforming to his principal's instructions, he required that the purchase price be paid before the bill of lading was passed to the vendee. The money was paid under that requirement and he then turned over the bill of lading. A delivery of the shipment followed and that completed the transportation."

In

O'Kelley v. *U. S.*, 116 F. (2d) 966 (C. C. A. 8),

a prosecution under 18 U. S. C. A. 409, the Circuit Court of Appeals, in reversing the appellant's conviction, held that while the proof might have established larceny at common law, it did not establish the violation of the federal statute charged in the indictment since the evidence contradicted the allegation that the merchandise was part of an interstate shipment at the time it was stolen. In here ruling that the contract of interstate shipment had been performed and the transportation completed by the delivery of the merchandise to the consignee and its acceptance by him, the court stated at page 967:

> "It was the duty of the carrier to make delivery of the property entrusted to it and it was the duty of the consignee to accept that property. Both of these duties had been performed before the seventeen sacks of sugar were stolen. It must be borne in mind that this entire carload of goods was consigned to the Howe Wholesale Company, at Ravana, Arkansas, and when it accepted the car, broke the seal, removed part of its contents, and placed its private padlock on the door, the carrier no longer had possession but had surrendered dominion over the property to the consignee, and the consignee in turn had accepted and assumed full dominion and control over the property. This we think was a final and complete delivery. It was no longer a subject of interstate commerce. Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 27 S. Ct. 360, 51 L. Ed. 540, etc."

In that decision the Circuit Court for the Eighth Circuit reviewed its own earlier decision in

Marifian v. *U. S.*, 82 F. (2d) 628 (C. C. A. 8),

and distinguished between the two cases on their facts.

It should be noted that these cases as well as the later case of *Murphy* v. *U. S.*, 133 F. (2d) 622 (C. C. A. 6), dealt

with thefts of merchandise moving in interstate commerce in violation of Section 409, Title 18, U. S. C. A., and the Court in the *O'Kelley* case held that the *Marifian* case was clearly distinguishable because in the latter case

> "there was a direct taking of the property while it was being transported in interstate commerce."

In the *Murphy* case the stolen merchandise had never been delivered to and accepted by the consignee but was still in the carrier's possession at the time of the theft which was the reason for the finding that it was still moving in interstate commerce when the larceny was committed. The distinction between those facts and the record now sought to be reviewed is obvious.

The authorities above cited which give the rule for determining when a movement in interstate commerce comes to rest are, we submit, equally controlling on the question of the termination of movements in foreign commerce.

We further respectfully submit that the evidence on which this Petitioner was convicted establishes as matter of law that any theft of the 495 cases of whiskey on the afternoon of August 3, 1942 was not a theft of a shipment moving in foreign commerce, that the charges in the indictment were not sustained and that Title 18, Sect. 409, U. S. C. A., was not violated in the respect charged in the indictment.

The construction of Title 18, Sect. 409, United States Code was, of course, for the court. The determination as to whether the admitted facts constituted the violation of the statute charged in the indictment, was a matter exclusively within the province of the trial judge. The only issue presented on that score was one of law.

The denial of Petitioner's motion for a directed verdict was error. It "was in effect submitting to the jury to determine the meaning of the Act of Congress", within

the condemnation of the decision in *Northern Pac. Ry. Co.* v. *Finch, et al.*, 225 Fed. 676, 678.

In an analogous situation the Circuit Court of Appeals for the Eighth Circuit said, with respect to the language of a federal statute involving the meaning of the term "common carrier" (*Blumenthal, et al.* v. *U. S.*, 88 F. (2d) 522, 528):

> "It is a question of law for the court to determine what constitutes a common carrier, though it may be a question of fact, whether, under the evidence if it is disputed, a carrier comes within the definition of a common carrier and is carrying on its business in that capacity."

Here, of course, there was no dispute in the evidence as to whether the foreign transportation of freight had terminated at Pier 1, Hoboken. Whether this uncontradicted evidence established a violation of the statute was not a question of fact but exclusively one of law for the court to decide. The refusal of the court to make this decision was error.

As was said in

U. S. v. *DiGenova*, 134 F. (2d) 466, 468 (C. C. A. 3).

> "This refusal by the trial judge to assume his responsibility to declare the law applicable to the facts of the case was not merely an error which made possible a conviction where there was no evidence to support the charge but in addition was an abdication by the trial judge of his judicial function which this court may neither ignore nor condone."

The obligation of a trial judge to discharge the duties of his office is not a discretionary responsibility. It is imposed on him by the common law and is sanctioned and upheld in the Constitution of the United States.

As this Court has said in

Quercia v. *U. S.*, 289 U. S. 466, 469.

> "Under the Federal Constitution the essential prerogatives of the trial judge as they were secured by the rules of the common law are maintained in the Federal courts."

In

Kalos v. *U. S.*, 9 F. (2d) 268 (C. C. A. 8),

where the defendant had been convicted of violating a federal statute by receiving unlawfully imported morphine with knowledge of its unlawful origin, the evidence was uncontradicted that defendant did not speak or understand English, and, therefore, could not have known that the morphine had been imported illegally. In reversing the judgment of conviction the appellate court stated, at page 271:

> "The testimony that defendant could not speak nor understand English is uncontradicted. But the Court instructed the jury:
>
> 'Whether he understood or did not understand, whether it may have been explained to him at the time, I will leave for you gentlemen to determine from all the facts and circumstances in the testimony given in the case concerning that transaction.'
>
> We find no basis for the last sentence of that part of the charge. It permitted the jury to decide a fact contrary to the proof against defendant. It gave them liberty to indulge in suspicions, to hold the defendant to the conversation as his admissions and that he was there to receive the package because he knew it was intended for him and he had the right to take it."

So in the case at bar. The submission of the question as to whether the 495 cases of whiskey were, when stolen, still moving in foreign commerce, gave the jury liberty to indulge in caprice and speculation which had no support in the evidence.

It permitted them to find that if this Petitioner was guilty of common law larceny he was necessarily guilty

of the violation of the federal statute charged in the indictment.

We submit that it was obvious error and prejudicial to this Petitioner's right to a fair and impartial trial by due process of law as guaranteed to Petitioner by the Constitution.

POINT II

The judgment of conviction cannot be sustained on the theory that the variance between the indictment and the proof was immaterial.

In affirming the judgment of conviction the learned Circuit Court of Appeals did not pass on the point that the foreign movement in commerce had ceased at the time the 495 cases of whiskey were stolen. The indictment was based exclusively on a theft of this whiskey while moving as a part of a foreign shipment of freight from Leith, Scotland to New York, N. Y. Nevertheless, the decision of the Circuit Court states:

> "But we find it unnecessary to decide this disputed issue. If the whiskey, when stolen, was not moving in foreign commerce, it was clearly moving in interstate commerce; and the same statute covers either situation. The indictment completely described the facts which made up the charges against the defendants and the variance between the allegation that the whiskey was 'moving as a part of a foreign shipment of freight' and the proof that it was part of an interstate shipment could not possibly have surprised or misled the appellant."

The indictment charged only a theft from foreign commerce. The prosecution made no motion to conform the indictment to the proof. The case was submitted to the jury on the sole theory of a theft from foreign commerce and the jury was asked specifically to determine if the

theft was one of merchandise being transported in foreign commerce.

But wholly apart from these considerations, we urge error in this decision of the learned Circuit Court on the ground that the proof on the trial established as matter of law that the whiskey was not moving as part of either foreign or interstate commerce at the time it was stolen. It was not moving as a part of any foreign or interstate shipment of freight within the language or intendment of Title 18, Sect. 409, U. S. C. A. It was in bond, for the protection of the Customs duties lien of the United States and its character as bonded merchandise precludes its classification as a freight shipment or a shipment in commerce.

The truck from which this whiskey was stolen was a bonded truck and licensed as such in the U. S. Customs. It was under the exclusive control of McKesson & Robbins, Inc., which firm also owned and operated a Class 1 Bonded Warehouse of the United States Government.

The 495 cases of Scotch whiskey had been entered in Customs by McKesson & Robbins, Inc., at Pier 1, Hokoben and necessarily were in bond from then until such time as the customs duties were paid thereon. The only way they could be moved to a bonded warehouse from Pier 1, Hoboken, was in a bonded vehicle licensed by the U. S. Customs. While in such a vehicle they were as much in bond as if they were actually in the bonded warehouse.

This truck of McKesson & Robbins, Inc., owner of the whiskey and operator of the Government Bonded Warehouse at No. 111 Eighth Avenue, New York City, was merely a branch of said warehouse. It was the equivalent of an annex or adjunct thereof. Its contents were in bond under the control of McKesson & Robbins, Inc., as warehouseman and the United States Government.

How could the transfer of bonded merchandise from one bonded Government depository to another, or to one by means of the other, be part of a foreign or interstate shipment when it had already been received, paid for and entered in Customs by the consignee? How could such transfer of said merchandise in bond be construed as part of a "movement in commerce" at all, either foreign or interstate?

The term "commerce" as employed in federal and state statutes of a penal or regulatory nature connotes traffic, trade or intercourse for compensation or emolument. It implies a means to a financial, pecuniary or other like remunerative end.

> *Gibbons* v. *Ogden*, 22 U. S. (9 Wheat.) 1;
> *Welton* v. *Missouri*, 91 U. S. 275;
> *Keller* v. *United States*, 213 U. S. 138;
> *United States* v. *Hoke*, 187 Fed. 992.

It cannot be said that McKesson & Robbins, Inc., the owner of the whiskey, was trafficking or trading for financial gain in the whiskey when it was being moved to the bonded warehouse in New York. The storage of the whiskey in the warehouse would be for the protection of the Customs duty lien of the United States Government, not for the benefit or profit of the owner. Likewise, the transportation in bond to the warehouse after the documents of title had been delivered to McKesson & Robbins, Inc., at Pier 1, Hoboken, was for the protection of this Customs lien.

The commercial elements of the transaction were all eliminated after the whiskey and the freight charges had been paid for by McKesson & Robbins, Inc., and title thereto had passed to that consignee and the whiskey had been delivered into its care and control at the pier in Hoboken. True, the right to immediate unqualified

possession was subject to the lien of the United States for the unpaid Customs duties and to safeguard that lien the whiskey was kept in bond.

The Customs entry was made by McKesson & Robbins, Inc., as consignee (by assignment), at Pier 1, Hoboken and the whiskey was entered in Customs as the property of McKesson & Robbins, Inc., and for that company's account (pp. 14, 15).

As owner of the whiskey, McKessons & Robbins, Inc., necessarily was chargeable with the Customs trucking and storage charges while the whiskey remained in bond. It is immaterial that such charges were payable to McKesson & Robbins, Inc., in its capacity as proprietor of the Government Warehouse at No. 111 Eighth Avenue, New York City. The merchandise might just as well have been stored in any other bonded warehouse. Wherever it was stored McKesson & Robbins, Inc., as owner of the whiskey derived no profit from the transaction of having it moved and stored in bond.

No matter where this whiskey might be moved and stored while in bond after it had been entered in Customs by McKesson & Robbins, Inc., as its property, such movement and storage would not be a part of a foreign or interstate shipment of freight or part of a foreign or interstate movement in commerce.

The commerce had ended, the transportation in commerce had ceased once the consignee had the merchandise delivered, entered, bonded and warehoused in its own name. All rights of stoppage in transit would thereupon terminate.

Taney v. *Penn. Nat'l Bank,* 232 U. S. 174;
Mottram v. *Heyer,* 5 Denio (N. Y.) 629;
Holbrook v. *Vose,* 6 Bosw. (N. Y.) 76;
In Re Talbot & Poggi, 185 Fed. 986;
Cartwright v. *Wilmerding,* 24 N. Y. 521.

The status of merchandise reposing in a bonded depository licensed by the United States is thus stated by this Court in *Taney* v. *Penn. Nat'l Bank supra,* at page 184:

> "The building, (warehouse), is his, but the government is in complete control. The spirits are his, but he is subject to fine and imprisonment if he attempts to remove them. It is undoubtedly true that the government is not strictly a bailee. It assumes no responsibility to the distiller for the safety of the goods. (United States v. Witten, 143 U. S. 76, 78, 36 L. ed. 81, 82, 12 Sup. Ct. Rep. 372.) But the immunity which is incident to the exercise of governmental power in no way limits its effect upon the distiller's relation to the goods. They are effectually taken out of his power so that he is absolutely unable to make a physical delivery of them until the tax is paid."

While the warehouse receipts showing the storage of the merchandise in bonded depositories are negotiable and may be the subject of trade, the merchandise itself is not susceptible of sale and delivery until the Customs duties and taxes are paid and the lien thereof released.

Conceivably there could be a movement in commerce of these warehouse receipts. Conceivably they could, if sufficient in quantity, form a part of a shipment of freight, foreign or interstate, and thus come within the subject matter of Section 409, Title 18, U. S. C. A.

But here the merchandise itself was stolen, not the receipt showing its deposit in a bonded depository, and, we submit that bonded merchandise is not merchandise moving in commerce.

The proof here showed the exact status of the bonded whiskey at the time it was stolen. The indictment charged a theft of merchandise of an entirely different status, namely, merchandise moving as part of commerce. May

it properly be said that such a variance was not a fatal one?

This Court has consistently held that the allegations of an indictment and the proof as adduced at the trial should correspond so that the defendant may be fully informed of the precise nature of the charge against him and will not be misled in preparing and conducting his defense on the trial.

Berger v. *U. S.*, 295 U. S. 78.

The learned Circuit Court, in its decision affirming the judgment has said that the record here does not indicate that this Petitioner was misled by any allegation of the indictment or any alleged variance.

May we respectfully refer to the remarks of this Petitioner's trial counsel made during the Prosecution's summation which would indicate why the Petitioner did not take the stand or offer any evidence in contradiction to that of the Government. He there stated, "In view of the development in the case, it is really—we are not bound to present that testimony."

Had this Petitioner not believed that the Prosecution had failed to establish the specific allegations of the indictment, would he have rested on the Government's case?

POINT III

The trial court's instructions and remarks to the jury constituted an abuse of judicial discretion and materially prejudiced the Petitioner's right to a fair trial.

Due process of law, as guaranteed by the Fifth and Sixth Amendments to the United States Constitution, is not a mere abstract formula but rather a requirement that

every accused be granted a fair and impartial trial in accordance with our traditions of justice.

We respectfully submit that appellant's constitutional safeguards were ignored and the standard of justice which should prevail was violated by the court's argumentative discussion as to the inferences which the jury might draw from the fact that the accomplice, James Stegman, the Government's key witness, probably would be sentenced later by the same trial court.

Such discussion on its face would seem to have displayed the zeal of an advocate rather than the impartiality of a judge.

It was an argument as to a future event, not in evidence and, therefore, not properly cognizable by the jury. For that reason alone, if for no other, it constituted prejudicial error.

U. S. v. *Breitling,* 20 How. 252;
Mullen v. *U. S.,* 106 Fed. 892 (C. C. A. 6).

As was stated by this Court in *U. S.* v. *Breitling, supra,* at page 255:

> "It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered. The instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the court; and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures, instead of weighing the testimony."

On equally cogent grounds, such statement constituted reversible error because of its obvious and manifest unfairness in inviting the jury to accept with favor the

motives and credibility of this Government witness, James Stegman.

When the trial court argued in its address to the jury:

> "Is he more likely to tell the truth or an untruth when he is testifying before the Judge who is going to sentence him? These are matters for you to consider. What is he to gain by telling the truth? What is he to gain by committing perjury in this case? Do you think it is going to help him if he commits perjury and he is going to be sentenced by this Court?"

in effect it told the jury that in all probability the witness had told the truth because he would have been afraid to lie before the trial judge.

What was James Stegman to gain? The answer may be found in the record of this trial, which shows that he obtained a suspended sentence for himself, although admittedly guilty of the crimes charged in the indictment and other like nefarious crimes.

If he committed perjury and the court was not apprized of it and such undetected perjury aided the Government's case, who could say that he would not have received the same consideration? Unless of course the court wanted to make the jury understand that the trial judge could not be deceived by any perjurer and that, therefore, the witness Stegman must have told the truth!

From any standpoint, we urge that this argumentative portion of the court's remarks was an abuse of judicial discretion and materially prejudiced the rights of this Petitioner on the trial.

Dwyer v. *U. S.*, 17 F. (2d) 696 (C. C. A. 2);
O'Shaughnessy v. *U. S.*, 17 F. (2d) 225 (C. C. A. 5);
Cline v. *U. S.*, 20 F. (2d) 494 (C. C. A. 8);
Minner v. *U. S.*, 57 F. (2d) 506 (C. C. A. 10);

Malaga v. *U. S.*, 57 F. (2d) 822 (C. C. A. 1);
Quercia v. *U. S.*, 289 U. S. 466.

As stated in *Malaga* v. *U. S.*, *supra*, at page 829:

> "Argumentative discussion on the effect of evidence as proof, or the inference to be drawn from the acts of witnesses, or of the respondent in a criminal case, are universally recognized as out of place from the bench."

Nor was the vice and unfairness of these argumentative comments cured by the trial court's added statement that the consideration of the matter was for the jury. The harm had been done and the nature of the instructions and comments was not basically remedied or corrected.

O'Shaughnessy v. *U. S.*, 17 F. (2d) 225 (C. C. A. 5);
Starr v. *U. S.*, 153 U. S. 614;
Quercia v. *U. S.*, 289 U. S. 466.

We quote from the decision of this Court in the case last cited:

> "In view of the fact that the jury is readily swayed by expressions of the court's opinion concerning the facts in any particular case, mere explanations that the opinion of the judge is not binding on the jury, under varying circumstances, have been held inadequate to counteract the influence of unwarranted statements from the bench."

Even though specific exceptions were not taken to these remarks, we ask this court in the exercise of its inherent constitutional powers to correct the results of such unjudicial statements, and to protect this Petitioner's rights. Precedent and authority therefor are not lacking.

Wiborg v. *U. S.*, 163 U. S. 632;
Crawford v. *U. S.*, 212 U. S. 183;
Williams v. *U. S.*, 66 F. (2d) 868 (C. C. A. 10).

CONCLUSION

We respectfully submit that this is a case eminently proper for this Honorable Court to review.

Dated: White Plains, New York, August 13, 1945.

Respectfully submitted,

CHARLES D. LEWIS,
Attorney for Petitioner,
175 Main Street,
White Plains, New York.

JAMES DEMPSEY,
of Counsel.

Appendix "A"

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 364 October Term, 1944.
(Argued June 18, 1945 Decided July 17, 1945)

UNITED STATES OF AMERICA,

Appellee,

v.

GEORGE SCHWARTZ, also known as GEORGE G. SCHWARTZ,

Defendant-Appellant,

and

ANTHONY COLONNA, alias "JIMMY VALENTINE", JAMES ALOYSIUS STEGMAN, FLORINDO ISABELLA, alias "FLO", alias "FLORIO" and JACK KAPS, alias "JACOB KAPS",

Defendants.

Before: L. HAND, SWAN and AUGUSTUS N. HAND,
Circuit Judges.

Appeal from the District Court of the United States for the Southern District of New York.

The appellant, George Schwartz, was convicted under an indictment charging in count one the larceny of goods moving in foreign commerce, 18 U. S. C. A. 409, and in count two conspiracy to commit such larceny, 18 U. S. C. A. 88.

JAMES DEMPSEY, Attorney for Appellant.

JOHN F. X. MCGOHEY, United States Attorney, for Appellee; John C. Hilly, Assistant United States Attorney, of Counsel.

Appendix "A".

SWAN, Circuit Judge:

The appellant was indicted with four other defendants but was the only one against whom the case went to trial, a severance having been granted as to the defendant Colonna and three other defendants having pleaded guilty. One of the three, James Stegman, became a witness for the prosecution and testified as to the appellant's participation in the crimes charged; the other two, Florindo Isabella and Jack Kaps, did not testify. It was stipulated, however, that Kaps was willing to do so but, if called, would be unable to identify the appellant. Schwartz did not take the stand and did not offer any proof; he rested at the conclusion of the Government's case. The jury found him guilty on both counts of the indictment, and the court imposed a sentence of ten years on count one and two years on count two to run consecutively.

Count one of the indictment charged the defendants with violating 18 U. S. C. A. 409 by stealing from a Mack truck 495 cases of Scotch whiskey "moving as a part of a foreign shipment of freight consigned by James Martin & Co., Ltd., Leith, Scotland, to McKesson & Robbins, Inc. at No. 111 Eighth Avenue, New York, N. Y." Count two of the indictment charged a conspiracy by the defendants to meet in Hoboken, New Jersey on August 3, 1942 for the purpose of boarding a Hoboken-West Twenty-Third Street Ferry, holding up the Mack truck carrying the whiskey described in count one, kidnapping its drivers, stealing the whiskey, and concealing it in a garage owned by the defendant Jack Kaps in Brooklyn, N. Y.

At the trial evidence was presented which would justify the jury in finding that the following facts were established. James Martin & Co., Ltd., Leith, Scotland, ship-

ped 1,000 cases of Scotch whiskey under a bill of lading providing for delivery at the Port of New York, running to the Manufacturers Trust Company, or its assigns, and bearing the notation, "Notify McKesson & Robbins, Inc., 111 Eighth Avenue, New York, N. Y." The cases were invoiced to McKesson & Robbins. Before the arrival of this whiskey on the steamer at Hoboken, New Jersey, McKesson & Robbins had paid the Manufacturers Trust Company, and the latter had assigned the bill of lading to them. McKesson & Robbins had also paid the freight charges but not the customs duty and taxes on the shipment. On the morning of August 3, 1942, McKesson & Robbins sent a bonded Mack truck operated by two of its employees to Pier 1 in Hoboken to pick up 495 cases of the whiskey and deliver them to its bonded warehouse at 111 Eighth Avenue, New York. It had previous to this date picked up 500 cases. The remaining five cases were kept out to go into the public stores for examination by Government appraisers. The 495 cases were loaded on the truck which then proceeded to the Hoboken-West Twenty-third Street Ferry. It was followed aboard the ferry-boat by an automobile occupied by the defendants Schwartz, Isabella and James Stegman. When the ferry reached its slip at Twenty-third Street in New York City, the two men who were driving it were held up by Schwartz and Isabella at the point of revolvers, and were forced, after leaving the ferry, to stop the truck and get into the automobile in which Stegman had followed the truck. Stegman then drove the truck to Kaps' garage in Brooklyn, where the whiskey was unloaded. The empty truck was driven back to New York and abandoned. In the meantime Schwartz and Isabella had held the two truck drivers in captivity in some unidentified building.

The main contention of the appellant is that the trial court erred in not directing a verdict of acquittal because

the Government's uncontradicted proof showed that when the whiskey was stolen it was no longer moving as part of a foreign shipment of freight. The argument is that when delivery was made and accepted by McKesson & Robbins at Pier 1 the foreign movement in commerce came to an end, even though the whiskey, which was being taken to a bonded warehouse by a bonded truck, was still subject to the control, if not the actual custody, of the customs officials. The Government answers, relying upon *United States* v. *Erie R. R. Co.*, 280 U. S. 98, that the intention of the foreign shipper was to have the whiskey delivered to McKesson & Robbins at 111 Eighth Avenue, New York City and consequently the transportation by truck was in fact a part of foreign commerce. None of the cases cited by either side is precisely in point. But we find it unnecessary to decide this disputed issue. If the whiskey, when stolen, was not moving in foreign commerce, it was clearly moving in interstate commerce; and the same statute covers either situation. The indictment completely described the facts which made up the charges against the defendants and the variance between the allegation that the whiskey was "moving as a part of a foreign shipment of freight" and the proof that it was part of an interstate shipment could not possibly have surprised or misled the appellant. (See *Berger* v. *United States*, 295 U. S. 78, 82; *Meyers* v. *United States*, 3 F. 2nd 379, 80 (C. C. A. 2); *United States* v. *Cohen*, 145 F. 2nd 82, 89 (C. C. A. 2).) His counsel suggests that he relied on the Government's failure to prove the allegation of a movement in foreign commerce in advising his client not to take the stand. If so, he merely chose to take his chance on a question of law rather than to dispute facts which showed a plain violation of the statute. The record does not disclose the least reason for supposing the appellant would have taken the stand, however, the indictment had read.

Appendix "A".

The alleged error in the charge merits little discussion. Direct testimony as to the appellant's complicity in the conspiracy was given by James Stegman and his brother, William, who was also one of the conspirators but was not indicted. James Stegman also testified to the appellant's participation in holding up the truck on the ferry. The parties disagree as to whether there was any corroboration of the testimony of these accomplices; but corroboration is not essential. (*United States* v. *Mule,* 45 F. 2nd 132, 133 (C. C. A. 2); *Bosselman* v. *United States,* 239 F. 82, 85 (C. C. A. 2).) The court instructed the jury to scrutinize the testimony of accomplices "with care and caution, and give it such weight as you think it is entitled to". This was an adequate charge on the subject. (*Caminetti* v. *United States,* 242 U. S. 470, 495; *Tuckerman* v. *United States,* 291 F. 958, 963 (C. C. A. 6), cert. den. 263 U. S. 716.) It is an extraordinary contention that reversible error was committed by a refusal to charge in the precise language of the appellant's request, namely, that the jury "must scrutinize with special care the testimony of one who is an accomplice". Nor is there any merit in the criticism leveled at the court's remarks, to which no exception was taken at the trial, concerning the likelihood of the truth or falsity of James Stegman's testimony.

Judgment affirmed.

INDEX

CITATIONS

667021—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 327

GEORGE SCHWARTZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 112–115) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered July 17, 1945 (R. 116). The petition for a writ of certiorari was filed August 16, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the property stolen was part of a foreign shipment of freight at the time of the theft.

2. Whether the trial judge erred in commenting upon the credibility of a codefendant who had pleaded guilty and testified on behalf of the Government and was awaiting sentence, and in calling the jury's attention to factors which they might consider in weighing the witness' credibility.

STATUTES INVOLVED

Section 1 of the Act of February 13, 1913, c. 50 (37 Stat. 670), as amended by the Act of January 28, 1925, c. 102 (43 Stat. 793), and the Act of January 21, 1933, c. 16 (47 Stat. 773), 18 U. S. C. 409, provides in part:

> Whoever * * * shall steal or unlawfully take, carry away, or conceal, or by fraud or deception obtain from any railroad car, station house, platform, depot, wagon, automobile, truck, or other vehicles, or from any steamboat, vessel, or wharf, with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express, * * * shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both, * * *. The words "station house," "platform," "depot," "wagon," "automobile," "truck," or

> "other vehicle," as used in this section, shall include any station house, platform, depot, wagon, automobile, truck, or other vehicle of any person, firm, association, or corporation having in his or its custody therein or thereon any freight, express, goods, chattels, shipments, or baggage moving as or which are a part of or which constitute an interstate or foreign shipment.

Section 37 of the Criminal Code, 18 U. S. C. 88, provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of New York (R. 94) on a two-count indictment (R. 3–7). Count one charged that beginning on or about July 1, 1942, and continuously thereafter up to and including September 30, 1942, petitioner, Anthony Colonna, James Stegman, Florindo Isabella, and Jack Kaps, stole from a truck 495 cases of Scotch whiskey, "moving as a part of a foreign shipment of freight consigned by James Martin & Company, Ltd., Leith, Scotland, to McKesson &

Robbins, Inc., at No. 111 Eighth Avenue, New York, N. Y.," in violation of 18 U. S. C. 409 (R. 3). Count two charged that the defendants conspired to violate 18 U. S. C. 409 by arranging to board a Hoboken–West Twenty-third Street ferry, steal with and from a truck the whiskey described in the first count, remove the drivers of the truck, and conceal the whiskey in a certain garage owned by defendant Kaps (R. 4–5). The case was severed as to Colonna on motion of the Government (R. 10); Stegman, Isabella, and Kaps pleaded guilty (R. 8–9), and petitioner was tried alone (R. 10). Petitioner was sentenced to ten years' imprisonment on the first count and two years on the second, to run consecutively (R. 101, 104). On appeal to the Circuit Court of Appeals for the Second Circuit, the conviction was affirmed (R. 116).

The pertinent evidence adduced at the trial may be summarized as follows:

McKesson & Robbins, Inc., of New York, was the importer of 1,000 cases of whiskey from Scotland under a bill of lading naming the Manufacturers Trust Company as consignee and bearing the notation "Notify McKesson & Robbins, Inc., 111 Eighth Avenue, New York, N. Y." (R. 12–14, 16, 113). The invoice was addressed to McKesson & Robbins at 111 Eighth Avenue, New York (R. 14). While the whiskey was in marine transit, McKesson & Robbins paid the invoice and freight charges, and received from the Manufacturers

Trust Company an assignment of the bill of lading (R. 16, 17). The carrier docked and unloaded the shipment on a pier at Hoboken, New Jersey (R. 20). Thereafter, McKesson & Robbins sent two of its employees to Hoboken with a leased, bonded truck to pick up 495 cases of the whiskey, on which the customs duty and taxes remained unpaid (R. 15), and haul them to the firm's bonded warehouse in New York (R. 16, 20, 25). Five cases had been kept out to go into the public stores for inspection by the customs appraisers (R. 19, 20). The employees put the cases on the truck and headed for New York via the Twenty-third Street Ferry (R. 20, 21, 26). In the meantime, according to the testimony of the defendant James Stegman and his brother William, another accomplice (see R. 42–48, 57–59), both of whom were called as witnesses on behalf of the Government (R. 41, 53), petitioner had made plans with James Stegman, Colonna, and Isabella to "hijack" the truck (R. 55–58). Petitioner, James Stegman, and Isabella followed the truck aboard the ferry in a car (R. 42–45, 59). When the ferry reached its slip in New York, petitioner left the car, mounted the running board of the truck, and at gun point compelled the employees to drive the truck a short distance beyond the slip (R. 60–61; see also R. 22–23, 26–27). He then made the employees stop, covered their eyes with taped glasses, and forced them to enter the

car, in which Stegman and Isabella had followed. Petitioner directed Stegman to drive the truck to a "drop" in Brooklyn (R. 58, 61–62), while he and Isabella took the employees in the car to a different neighborhood, where they detained them on the roof of a building for a few hours and then released them. (R. 23–24, 27–28, 61.) After the whiskey had been unloaded at the drop, James Stegman drove the truck to New York and abandoned it (R. 61–63).

Petitioner did not take the stand or offer any evidence in his behalf, except a stipulation that if the defendant Kaps had been called, he would not have been "able to identify" petitioner (R. 83.)

ARGUMENT

1. Petitioner contends (Pet. 9–17) that the trial court committed reversible error in denying his motion for a directed verdict made at the end of the Government's case on the ground that, as a matter of law, at the time of the larceny the whiskey was no longer moving as a part of a foreign shipment, as alleged in the indictment (R. 80–81). He argues that when McKesson & Robbins paid the invoice and received by assignment the bill of lading while the shipment was in marine transit, it thereby acquired the right to change the contract of shipment in any way agreeable to itself and the carrier; that in consequence of the practice and course of conduct between McKesson

& Robbins and the carrier on this and prior shipments, an agreement had resulted whereby, after payment of the price and freight charges, the whiskey was to be unloaded and delivered to McKesson & Robbins at a pier in Hoboken, there to be entered in customs pending payment of the duties, and then removed by truck to McKesson & Robbins' bonded warehouse in New York;[1] that under these circumstances, irrespective of any original intention as to the ultimate destination of the whiskey, the legal effect of the contract of shipment, as modified by this practice and course of conduct, was to complete at the Hoboken pier the whiskey's movement as part of a foreign shipment; and that, therefore, the theft of the whiskey while en route from Hoboken to New York via truck was not a larceny of a foreign shipment of freight. We submit that petitioner's contention and argument are without merit.

The intention of the shipper and McKesson & Robbins, as evidenced by the address on the in-

[1] There is no evidence of any "practice and course of conduct" on the part of McKesson & Robbins, except as indicated by the testimony of the firm's traffic manager, who testified: "The accepted practice of McKesson in the purchase of Scotch whiskey was that it was agreed that it was to be cleared through the Manufacturers Trust Company, and the bill of lading was assigned by them and endorsed by them after McKesson had paid for the merchandise" (R. 16–17). It is to be noted that the arrangement referred to was one between the importer, the shipper, and the bank, and not between the importer and the carrier.

voice and the indorsement on the bill of lading to notify McKesson & Robbins at its address in New York, was that the whiskey was to be delivered to its bonded warehouse in New York. We submit that there is no proof of any "agreement," as asserted by petitioner (Pet. 11–12), between the carrier and McKesson & Robbins calling for a change in the destination of the shipment. An erroneous impression is conveyed in petitioner's argument that the ad interim entry of the whiskey in customs in Hoboken was inconsistent with the expressed intention of McKesson & Robbins to enter it in customs in the bonded warehouse in New York. The evidence and the realities of the situation lend no support to that contention. The entry in customs in Hoboken was unavoidable, being a legal detail required by the revenue laws, and having no significance as a determinant nullifying the importer's intention that the whiskey resume its journey for final entry into customs at New York. A mere change in the method of transportation does not, of course, affect the continuity of the transit where such interruption is only temporary and in execution of the original purpose. The nature of a shipment does not depend upon the question when or to whom the title passes, but is determined by the essential character of the commerce and the intention of the parties as to the ultimate destination of the goods. *United States* v. *Erie R. Co.*, 280 U. S. 98, 101–

102;[2] *Levi* v. *United States,* 71 F. 2d 353, 354 (C. C. A. 5); *Friedman* v. *United States,* 233 Fed. 429 (C. C. A. 1), certiorari denied *sub nom. Freedman* v. *United States,* 244 U. S. 657, writ of error dismissed, 244 U. S. 643; cf. *Minnesota* v. *Blasius,* 290 U. S. 1, 9–10; *Hughes Bros. Co.* v. *Minnesota,* 272 U. S. 469, 474. Applying these principles to the facts of the instant case, we think it is clear that the whiskey was still moving as part of a foreign shipment at the time of the theft. See *Marifian* v. *United States,* 82 F. 2d 628, 630 (C. C. A. 8), certiorari denied, 298 U. S. 686, where it was held that the protection of the statute here involved extended to goods, the carriage of which by rail had been completed at East St. Louis, Illinois, and which were at the time of the theft being transported in a truck leased by the consignee to its place of business in St. Louis, Missouri.

The circuit court of appeals found it unnecessary to decide whether the whiskey was moving as part of a foreign shipment at the time it was stolen, because in its view the whiskey was clearly moving in interstate commerce from New Jersey to New York, and the court held that proof showing that it was moving as an interstate shipment

[2] In that case a shipment of wood pulp was imported from abroad through the port of Hoboken, New Jersey, and taken from there to Garfield, New Jersey, by rail, and it was held that the rail transportation was in fact a part of foreign commerce.

did not constitute a fatal variance. Petitioner argues here (Pet. 17–22) that his conviction cannot be sustained on that ground. In view of the considerations advanced above, we deem it unnecessary to support with extensive argument the judgment below on the basis chosen by the court. However, we agree that on such basis there is no fatal variance between the indictment and the proof, since, as the court pointed out (R. 114), the indictment fully apprised the defendants of the facts which made up the charges against them (see pp. 3–4, *supra*) and they could not, therefore, have been misled or surprised.

2. In the course of his instructions, after pointing out that "certain" government witnesses were accomplices and advising the jury to scrutinize their testimony "with care and caution," the trial judge stated (R. 90–91):

> One of the witnesses here, James Aloysius Stegman, has pleaded guilty and is awaiting sentence, when he testified as a witness. Of course every witness expects that by testifying he is going to get a consideration. He would be entitled to consideration if he were telling the truth. In a case like this in all probability he is going to be sentenced by this Court, by myself. Is he more likely to tell the truth or an untruth when he is testifying before the Judge who is going to sentence him? Those are matters for you to consider. What is he to gain by telling the truth? What is he to gain by committing perjury

> **in this case? Do you think it is going to help him if he commits perjury and he is going to be sentenced by this Court? Just use your common sense and reason. These are matters for your consideration.**

Although petitioner took no exception to the instructions (see R. 91–92), he now contends (Pet. 22–25) that these remarks were tantamount to a statement that the judge believed Stegman's testimony because Stegman was not likely to lie before the same judge who was to sentence him. It is settled, however, that the trial judge may comment on the evidence and even express his opinion so long as he does not by command or other coercion infringe upon the jury's province to determine the facts. See *United States* v. *Murdock,* 290 U. S. 389, 394; *Quercia* v. *United States,* 289 U. S 466, 469; *Horning* v. *District of Columbia,* 254 U. S. 135, 138, 139. Here the judge merely called to the jury's attention certain obvious factors, of which the jury had already been apprised in the course of the trial (see R. 54, 68–69), which they might consider in weighing Stegman's credibility. The judge explicitly told the jury that the determination of the facts and the guilt or innocence of petitioner were within their sole and exclusive province (R. 87, 91), and he was careful to admonish them that even if he were to "express an opinion on any phase of the testimony, it would be in no wise binding upon" them (R. 87; see also R. 91); that his

references to the testimony were not for the purpose of emphasis, but merely to aid the jury in arriving at a verdict (R. 89). When read in its entirety, the charge is not open to criticism that the judge by the comments in question prejudiced petitioner. *Allis* v. *United States,* 155 U. S. 117, 123; *Simmons* v. *United States,* 142 U. S. 148, 155; *United States* v. *Marzano,* 149 F. 2d 923, 926 (C. C. A. 2); *United States* v. *Goldstein,* 120 F. 2d 485, 491 (C. C. A. 2), affirmed, 316 U. S. 114; *Marino* v. *United States,* 91 F. 2d 691, 699 (C. C. A. 9); *United States* v. *Frankel,* 65 F. 2d 285, 288 (C. C. A. 2), certiorari denied, 290 U. S. 682; *Russell* v. *United States,* 12 F. 2d 683, 686–692 (C. C. A. 6), certiorari denied, 273 U. S. 708.

CONCLUSION

The judgment of the court below affirming petitioner's conviction is correct. The case does not involve any conflict of decisions or question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

HAROLD JUDSON,
Acting Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
CHARLES J. SMITH,
Attorneys.

SEPTEMBER 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 327.

GEORGE SCHWARTZ,
Petitioner,

AGAINST

UNITED STATES OF AMERICA.

REPLY BRIEF FOR PETITIONER.

(Nature of the Shipment.)

In contending that the transportation of the whiskey in bond from Hoboken to New York was a movement in foreign commerce or a movement of a foreign shipment of freight, respondent seeks to sustain the judgment below on grounds other than those relied on by the Circuit Court in making the judgment (R. 114).

We submit that the theory of a theft of merchandise moving in foreign commerce is not here tenable.

The 495 cases of whiskey had been delivered into the possession of McKesson & Robbins Inc. at Hoboken prior to the theft thereof charged in the indictment (R. 14, 18, Government's Exhibit 4). The purchase price had been paid by McKesson & Robbins Inc. to the original consignee the Manufacturers Trust Company, the freight charges had

also been paid in full and the bill of lading for the entire shipment of the 1,000 cases of whiskey had been assigned to McKesson & Robbins Inc. (R. 16, 17). When this bill of lading was turned over to the carrier at Pier 1, Hoboken, on August 3, 1942 and the whiskey delivered to and received and accepted by McKesson & Robbins' representatives, full ownership and legal possession of the whiskey were vested in that company as consignee.

The lien of the United States for the amount of the unpaid customs duties did not impair this actual and legal possession so vested in McKesson & Robbins Inc. It did not give the Government possession of the whiskey in any legal sense. Such lien merely created a restraint on the removal of the whiskey from bond while still in the possession of McKesson & Robbins Inc. until the customs duties and taxes should be paid. *Waldron* v. *Romaine,* 22 N. Y. 368; *Cartwright* v. *Wilmerding*, 24 N. Y. 521. The whiskey was entered in bond at Pier 1, Hoboken, by and in the name of McKesson & Robbins Inc. as the owner thereof. It remained under the restraining custody of this customs bond from then until the time it was stolen while being transported in McKesson & Robbins' bonded truck to McKesson & Robbins' bonded warehouse at No. 111 Eighth Avenue, New York City. Possession had already been acquired by the consignee and the subsequent transportation of the whiskey to New York was merely a movement of bonded merchandise in one bonded depository, (the truck), to another bonded depository, (the warehouse).

We respectfully urge that such a movement was in further protection of the Government's customs lien and not a movement of a foreign shipment of freight or a movement in foreign commerce for delivery to a consignee. We suggest that it was not a movement in commerce at all, certainly not a movement in foreign commerce. The foreign element in the freight shipment from Scotland would seem

to have been eliminated when the entire 1,000 cases of this whiskey were delivered, price and freight charges paid, into the ownership and possession of the new consignee, McKesson & Robbins Inc. at the place finally fixed by this consignee and the steamship carrier as the new place of delivery of the whiskey. Once the shipper in Scotland was paid the purchase price he had no further concern with any change in the place of delivery agreed upon by the carrier and this consignee. The contract of shipment could have been altered at any time to provide for a new place of delivery and the record here shows that on this 1,000 case shipment the carrier and McKesson & Robbins Inc. agreed that the place of "pick-up" and delivery was to be Pier 1, Hoboken (R. 14, 18). Any subsequent interstate or intrastate transportation was to be at the expense of McKesson & Robbins Inc. as the owner in possession of the whiskey.

We suggest that the element of possession by the consignee distinguishes this case from *United States* v. *Erie R. Co.*, 280 U. S. 98, relied on by respondent. In that case the prospective purchaser had never acquired possession of the merchandise which was being shipped to it by rail at Garfield, New Jersey, from the steamship pier at Hoboken, New Jersey, and this Court upheld a finding that such shipment was merely a part of the original shipment from abroad since the commerce was foreign commerce and the nature of the transportation was to be determined by the essential character of the commerce. In the case at bar the movement in foreign commerce ceased at the steamship pier in Hoboken when the carrier surrendered possession of the merchandise directly to the consignee, McKesson & Robbins, Inc. by making a final and complete delivery thereof.

Respondent cites *Marifian* v. *United States*, 82 F. (2d) 628, 630 (C. C. A. 8), certiorari denied, 298 U. S. 686, in arguing that the protection of the statute (Title 18,

Sec. 409, U. S. C. A.), extends even to situations where merchandise is in the possession of a consignee when stolen. We respectfully submit that the case is not authority for the proposition that a theft of a shipment after it has arrived at its destination and has there been delivered to and accepted by a consignee is a violation of this statute. The *Marifian* case is clearly distinguishable on its facts and was so distinguished and its ruling limited by the very court that decided it in the later case of *O'Kelley* v. *United States,* 116 F. (2d) 966, (C. C. A. 8). In the *Marifian* case a carload of merchandise was being shipped, freight prepaid, from Richmond, Virginia to a consignee at St. Louis, Missouri. The consignee intercepted the shipment, apparently without any prearranged agreement, at East St. Louis, Illinois, paid the price and freight charges on a portion only of the carload, and loaded this portion on consignee's truck to take it to consignee's place of business at St. Louis, Missouri, the specified designation of the entire shipment. The truck was waylaid on this interstate journey to Missouri and its contents stolen. The indictment charged a theft of merchandise moving as part of an interstate shipment of freight in violation of Title 18, Sect. 409, U. S. C. A., and the defendant's conviction on proof of the foregoing facts was affirmed by the Circuit Court.

It should be noted that there the entire shipment had never reached its destination and come into the consignee's possession by the time a portion of the shipment was stolen while moving on the separate interstate journey in the truck. That, of course, is not the situation in the case at bar, where the entire shipment of 1,000 cases of whiskey actually had been delivered to the consignee at the steamship pier in Hoboken, and the price and freight charges paid thereon before the 495 cases were stolen.

As the Circuit Court of Appeals for the Eighth Circuit stated in *O'Kelley* v. *United States,* 116 F. (2d) 966, 968:

> "The facts are clearly distinguishable. In the *Marifian* case there was a direct taking of the property while it was being transported in interstate commerce. In the instant case the property had been received and accepted at its destination. The property was then not the subject of interstate commerce."

Under the doctrine of both the *Marifian* and *O'Kelley* cases it would appear that the 495 cases of whiskey in the case at bar were not the subject of foreign commerce when they were stolen.

(The Court's Charge.)

In his instructions to the jury the trial judge stated that probably he would sentence the accomplice James Stegman on some later date and added "Is he (Stegman) more likely to tell the truth than an untruth when he is testifying before the Judge who is going to sentence him?" (R. 90).

Respondent now urges that this was merely calling to the jury's attention certain "obvious factors, of which the jury had already been apprised in the course of the trial." We respectfully submit that the record furnishes no basis for such a contention. It shows only that this witness testified on cross-examination that he had pleaded guilty on the eve of this trial, that he had not yet been sentenced and that he had made a statement to the Government two years previously (R. 54, 68, 69). There was no evidence of any understanding, arrangement or requirement for Stegman to be sentenced at some later date by the judge who presided at petitioner's trial. The trial court's discussion of this subject clearly constituted an argument as to some future event not in evidence and a reference to a supposed or conjectural state of facts of

which no proof had been offered. As such, we submit, it falls within the condemnation expressed by this court in *United States* v. *Breitling*, 20 How. 252, 255.

We respectfully suggest that such statements in the charge prompted the jury to indulge in speculation as to the credibility of the witness instead of weighing his testimony with the special care and caution required in scrutinizing the evidence of a self-confessed accomplice. As such they constituted error which was material and prejudicial to petitioner's constitutional rights since the witness James Stegman was the Government's key witness, the only one who testified to petitioner's alleged participation in the "hijacking" and theft of the whiskey. Unless the jury could have been induced to credit his testimony the petitioner could not have been convicted.

Respondent's brief comments on petitioner's failure to except to this charge of the trial judge. Such failure would not be fatal to petitioner's right to raise the point now, even if he had not, as he had, taken a general exception to all errors in the charge before sentence was imposed on him. Under the approved doctrine in criminal cases, any substantial error prejudicial to a defendant may be corrected on appeal regardless of the state of the record. *Wiborg* v. *United States*, 163 U. S. 632; *Crawford* v. *United States*, 212 U. S. 183; *Williams* v. *United States*, 66 F. (2d) 868, 869 (C. C. A. 10).

As the Circuit Court stated in the case last cited:

> "Alleged errors during the progress of the trial should be called to the trial court's attention by specific objection and exception in order that it may have the opportunity to correct the error. In the absence of such specific objection and exception, alleged trial errors ordinarily will not be reviewed

on appeal. *Addis* v. *U. S.* (C. C. A. 10) 62 F. (2d) 329. But under a well recognized exception to this general rule, the appellate courts of the United States, in criminal cases involving the life or liberty of the accused, may notice and correct serious errors in the trial of the accused, fatal to his rights although those errors were not challenged or reserved by objections, motions, exceptions or assignments of error. *Addis* v. *U. S., supra*; *Reynolds* v. *U. S.* (C. C. A. 10), 48 F. (2d) 762; *Bogileno* v. *U. S.* (C. C. A. 10), 38 F. (2d) 584; *Van Gorder* v. *U. S.* (C. C. A. 8), 21 F. (2d) 939; *Lamento* v *U. S.* (C. C. A. 8), 4 F. (2d) 901; *Ayers* v. *U. S.* (C. C. A. 8), 58 F. (2d) 607; *Wiborg* v. *U. S.*, 163 U. S. 632; 16 S. Ct. 1197, 41 L. Ed. 289; *Crawford* v. *U. S.*, 212 U. S. 183, 29 S. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392."

CONCLUSION.

We respectfully submit that this Court should grant the petition for a writ of certiorari.

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